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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-93

SHANNON & LUCHS COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER

JAMES P. MERCURIO
SALVATORE A. ROMANO
900 Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
900 Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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This case raises important questions concerning two critical elements in a conspiracy offense under Section 1 of the Sherman Act. The first question, concerning the district court's holding on the element of interstate commerce, appears essentially the same as that pending before the Court in *McLain* v. *Real Estate Board of New Orleans,* 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* 99 S.Ct. 2159 (1979) (No. 78-1501). Petitioner thus urges that a writ of certiorari should be granted so that this case can be considered as a companion case to *McLain. See* Pet. 15-16.

In its brief in opposition, the government, although at one point conceding the essential identity of the questions raised in this case and in *McLain*, neverthe-

less opposes companion consideration on the following ground (Brief in Opp. 6 n. 7):

> It is unnecessary to review a lengthy factual record, such as this case possesses, to conclude in *McLain* that the allegation that real estate brokerage activity substantially affects commerce is not so frivolous as to warrant dismissal for lack of subject matter jurisdiction under the Sherman Act. . . .

Should the government's characterization of the question presented in *McLain* be correct, there is all the more reason to grant the instant petition. The record in this case squarely presents the question of law whether the interstate aspects of modern real estate transactions render the Sherman Act applicable to the local activities of real estate brokers, not the limited question whether bare allegations are "so frivolous" as to warrant dismissal.

The second question presented in the instant case concerns the district court's instruction that the essential element of knowing participation in a conspiracy is satisfied by a "knowing assistance of any kind in effectuating the objective of the conspiracy" (J.A. 909). In its brief in opposition, the government erroneously characterizes this portion of the instruction as a mere "*example* of what constitutes knowing participation in the conspiracy" (Brief in Opp. 10, emphasis added). The quoted instruction was not an example. It was a definition, and it was the only express definition of the concept of knowing participation given in the entire charge.

The government nowhere contends that the definition was correct.[1] The contention it does make—that other portions of the instructions cured the error—fails to recognize the logical necessity that an erroneous definition, once stated, is not rectified by mere repetition of the erroneously defined term. The district court's charge erroneously defined the term "knowing participation" in a manner that omitted the essential element of intent to agree. It cannot be presumed that the jury ignored this portion of the charge. The error therefore pervaded the entire charge, no matter how many times the court may have reiterated the term "knowing participation" or terms of similar import.

CONCLUSION

The petition of writ of certiorari should be granted.

Respectfully submitted,

JAMES P. MERCURIO
SALVATORE A. ROMANO
900 Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
900 Federal Bar Building
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[1] In expressly reserving the question whether the challenged instruction is correct (see Pet. 24a), the court of appeals thus raised a question of law that the parties' contentions do not raise.

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